



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 30, 1998

Ms. Tracy B. Calabrese  
Senior Assistant City Attorney  
City of Houston  
Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR98-3260

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120825.

The City of Houston (the "city") received a request for "all files in the Legal Department relating to the speed hump program and/or the Traffic Claiming Section of the Public Works Department and including files relating to the Harold Barbin suit from the years 1995 through September 1998." You indicate that you are releasing most of the requested information. You claim, however, that portions of the requested information are protected from disclosure by sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue, submitted Exhibits 2, 3, and 5.

You first claim that marked portions of Exhibits 2 and 3 are excepted from disclosure as attorney work-product. You have marked the information you seek to withhold. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). You explain that the information at issue was created for litigation concerning the city's street hump program. The case was eventually dismissed. *Barbin v. City of Houston*, No. 97-15189 (113<sup>th</sup> Dist. Ct., Harris County, Tex., Feb. 11, 1998) (order of dismissal for want of prosecution). You have demonstrated in this case that the documents at issue were created for litigation. You have established the applicability of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that the materials reflect "the mental processes, conclusions, and legal theories of the assistant city attorney who handled the lawsuit. Because the notes legal

drafts, comments and opinions reflect the attorney's thought processes and legal theories," you argue the information should be withheld. Having reviewed the information and your arguments, we can easily conclude that most of the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue contains additional information that merely refers to the facts of a case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991)). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. See *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1990, no writ). This information would likewise not be protected under the attorney-client privilege. Open Records Decision No. 574 at 3 (1990) (basic factual communications from attorney to client, or between attorneys representing the client, are not protected by section 552.107). We have marked the information in Exhibits 2 and 3 that may be withheld under section 552.111 as attorney work-product.

Lastly, you argue that a marked portion of Exhibit 5 may be withheld as an intra agency memorandum under section 552.111. Section 552.111 excepts "an interagency or intra agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. We conclude that you may withhold the information you have marked in Exhibit 5 under section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB\rho

Ref: ID# 120825

Enclosures: Marked documents

cc: Ms. Amy B. Muhs  
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(w/o enclosures)